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Proportionality and All That: Ten-Month Review of the Effects of the 2015 Amendments to the Federal Discovery Rules

by

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I. <u>The Backdrop: Abusive and Disproportionate Discovery Still Occurs</u>

Blake v. Batmasian, 2016 WL 4618931 (S.D. Fla. Sept. 2, 2016) (No. 15-CV-81222), was a one-count FLSA overtime case. Plaintiffs' counsel included in his Complaint a host of allegations the Court struck as being "collateral, irrelevant, immaterial and scandalous." That is putting it mildly:

> As to the pleadings, on June 13, 2016, the Court entered an Order on Motion to Strike … in which the Court struck numerous allegations from the Corrected Second Amended Complaint [DE 28], such as: (1) the allegation that Defendants defaulted on a $105,000,000 loan; (2) hearsay commentary that Defendants are "extremely wealthy, powerful and feared individual[s]"; (3) allegations that Defendant James Batmasian failed to pay taxes, including withholding or federal payroll taxes, and previously went to prison for failure to pay payroll taxes; and (4) the allegations of prurient and vulgar behavior on the part of Mr. Batmasian contained in paragraphs 18 through 23 of the Corrected Second Amended Complaint with the exception of the massage vouchers (minus the happy ending allegations).
>
> The material stricken from paragraphs 18 through 23 included allegations that James Batmasian discusses sexual desires with employees in and around the office, that he routinely discusses his sexual desires regarding women and younger female employees, that he gifts employees vouchers for happy ending massages, that he sends pornographic text messages, that he views and forwards pornographic materials, that he uses extremely vulgar language when referring to women as sex objects, and that he texts obscene and profane material to his senior management, sometimes including his wife. … The stricken material included a reference to a media article in which James Batmasian allegedly falsely denied his "deviant sexual nature"; also stricken were allegations that opt-in plaintiff Sotomayor filed a lawsuit against Defendant for sexual harassment and that James Batmasian attempted to enlist Blake to assist in the defense of the Sotomayor lawsuit, but Blake refused since James Batmasian uttered crude and vulgar comments against women and harassed them. *Id.* at ¶¶ 21, 23. The Court struck all such allegations as being immaterial, impertinent and scandalous [DE 137].

Id. at *1-*2 (footnotes omitted). Plaintiff then used his depositions to enquire into these topics claiming they were relevant to show an official's participation in running the business although that had been stipulated, moved to compel answers, and moved for additional deposition time to explore these topics. Defendants moved for a protective order. The court granted defendants' motions, denied defendants' motion, and reserved the issue of sanctions. The court mentioned the importance of proportionality but placed heavier weight on the 2015 amendment to Rule 1 making counsel as well as the court responsible for the "just, speedy, and inexpensive determination of every action and proceeding." Nonetheless, the same decision would clearly have resulted before the amendments; the court cited primarily pre-amendment authorities, and there was no indication in its opinion that the amendments made a difference to the result, instead of merely adding grace notes to the decision.

II. <u>Changes in Practices</u>

My personal experience is that some defense counsel seem unaware of the changes in the Civil Rules that took effect on December 1, 2015, and are continuing in their former practices. I

am sure the same is occurring with some plaintiffs' lawyers. Boilerplate objections to discovery are continuing.

It seems to me well worth the effort to educate opposing counsel and bring them on board, so that the Court is presented with a compliant Rule 26(f) report and the case can proceed smoothly.

I am seeing more judicial involvement in discovery questions at the Rule 16 scheduling conference, with judges making clear that proportionality in discovery is at the top of their agendas. This can cause alarm for counsel and parties whose claims or defenses are based primarily on information in the hands of their opponents, *i.e.*, "asymmetric" discovery situations.

Sometimes, judges are seduced by the assumption that everything that is wrong in the civil litigation proceeds can be cured by clamping down on discovery. For example, one judge I have been before has a standard presumption that depositions for each side should be limited to 25 hours. The presumption can be overcome, but this illustrates the reasons why plaintiffs' counsel fear the worst whenever the discovery rules are changed.

More judges are holding at least telephonic Rule 16 scheduling conferences on discovery reports, and are getting into discovery questions more deeply than before. This brings the courts more into line with standard arbitration practice, which has been reducing costs in this manner for years.

III. The Duke Conference Guidelines on Proportionality

There is a great resource I recommend to all practitioners, DUKE'S REVISED *GUIDELINES AND PRACTICES* CHART SAFE PASSAGE TO PROPORTIONALITY (2016), to be published in the forthcoming November 2016 issue of *Judicature*. Prof. John Rabiej of Duke University Law School has graciously granted permission for us to provide this document to you in advance of its publication (and before final proofreading). The publication includes a thoughtful article by Hon. Lee Rosenthal and Prof. Steven Gensler, *A Report from the Proportionality Roadshow: Recommendations from the Bench and Bar in 17 Cities on Implementing the 2015 Proportionality Amendments.*

Prof. Rabiej reports that that the *Guidelines* "are annotated monthly with case law. So far about 250 reported cases have cited the amendments and are described in the annotated Guidelines." The annotated Guidelines are posted at https://law.duke.edu/sites/default/files/centers/judicialstudies/civil_rules_project_draft-sept.pdf.

IV. Whether the Amendments Are to Be Applied to Pending Cases as of December 1, 2015

The cases are virtually unanimous in holding that the proportionality amendments and amendments to Rule 37(e) are to be applied to pending cases.

The courts have generally held that the proportionality amendments clarify and increase the importance of an existing obligation already in the rules, so applying them to pending cases does not create a new burden or violate any equitable interests of any parties.

Similarly, the early cases on the amended Rule 37(e) principally involve jurisdictions in which the existing controlling case law used the same standards as set forth in Rule 37(e), so the courts there have seen no problem in applying the amendments.

In those Circuits and districts that previously used different standards or relied on inherent authority or on State law, the amended Rule 37(e) may impose different standards not predicted by the spoliating party at the time of spoliation. Whether the courts will have sympathy for the spoliating party remains to be seen.

V. Proportionality

A. Overly Strong Reliance on Proportionality to Bar Discovery of What the Court Thinks is Obvious, Without Considering the Adequacy of the Resulting Record

Lombardi v. NCL (Bahamas) Ltd., 2015 WL 12085849 (S.D. Fla. Dec. 11, 2015) (No. 15-20966-CIV), a personal-injury case involving an older passenger's fall on a threshold and the contention there should have been a warning, stated at *1:

> But under the 2015 Amendments to Rule 26(b), the traditionally liberal limits on discovery must be juxtaposed against proportionality considerations in a given case and the Court's obligation to determine, on a case-specific basis, the appropriate scope of discovery.

The court's ruling on the discovery requests at issue, limiting them to ease the burden in defendant, focusing on the most relevant information, and holding that little discovery is needed because some facts were obvious, such as that the elderly like going on cruise ships, may have been affected by this observation. If so, the court did not make its reliance explicit. The court did not discuss whether a jury would be required to accept what it saw as obvious. Nor did the court discuss plaintiffs need to show that the defendant knew older persons would be traveling on its ships enough in advance of the voyage in question to make a warning necessary.

B. Proportionality Used to Limit Discovery in False Claims Act Litigation

United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co., --- F.3d ---, 2016 WL 5799660 (3d Cir. Oct. 5, 2016) (No. 15-2169), a reverse False Claims Act case in which plaintiff alleged the defendant failed to pay proper customs duties for imported pipe, the court suggested using the proportionality rule to limit discovery in False Claims Act litigation:

> Although we hold that CFI has done just enough to allow this matter to proceed, we are aware of the great expense and difficulty that may accompany False Claims Act

discovery and the burden on defendants and their shareholders and investors of having unresolved allegations of fraudulent conduct in pending proceedings. Because of our awareness, we have looked to the recent amendments to the Federal Rules of Civil Procedure; those rules provide some guidance as to how excessive expense and difficulty may be avoided and how discovery should proceed.

> In December 2015, a series of amendments to the Federal Rules were enacted to improve a system of civil litigation that "in many cases ... has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts." To counter these problems, the 2015 amendments placed a greater emphasis on judicial involvement in discovery and case management and cooperation among litigants' counsel.
>
> *   *   *
>
> As Chief Justice Roberts wrote of these amendments, "[t]he key here is careful and realistic assessment of actual need" that may "require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery." The instant matter is a prime example of the need for such controlled discovery.
>
> CFI alleges a massive, systematic effort by Victaulic to avoid paying marking duties on any of its imports. Since Victaulic's motion to dismiss was granted, there has been no answer from the defendant as to whether any of CFI's allegations are true. An answer could shed some light on these allegations. Similarly, while CFI has identified millions of pounds of imported pipe fittings that it alleges were mismarked, proportional discovery would counsel in favor of limiting the scope of early discovery. It will be up to the District Court and counsel to determine an appropriately limited discovery plan, perhaps reviewing the documents and duties paid on a representative sample of the shipments identified by CFI.
>
> In any event, Chief Justice Roberts noted that "[j]udges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation." The instant matter will require the active involvement of the District Court, in conjunction with counsel and their clients, to limit the expense and burden of discovery while still providing enough information to allow CFI to test its claims on the merits.

Id. at *12-*13. Judge Fuentes concurred in part, dissented in part, and dissented from the judgment.

C. <u>Proportionality Used to Bar Cumulative Discovery</u>

Bingham v. Baycare Health System, 2016 WL 4467213 (M.D. Fla. Aug. 24, 2016) (No. 8:14-CV-73-T-23JSS), denied plaintiff's motion to compel discovery of documents from a nonparty, where the plaintiff had already obtained documents showing the same information

from another nonparty. The court stated at *4 that discovery should be barred "if the discovery sought is unreasonably cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

D. Proportionality Does Not Expand Discovery by Excusing Irrelevance

Herman v. Seaworld Parks & Entm't, Inc., 2016 WL 3746421 (M.D. Fla. July 13, 2016) (No. 8:14-CV-3028-T-35JSS), held that discovery as to the plaintiff's contracts with third parties, which assertedly would show his familiarity with contract terms similar to those in the contract at issue, were irrelevant and burdensome. The court held that defendant's narrowing of the discovery request to make it less burdensome did not save the discovery requests under the proportionality standard, because the discovery was still irrelevant. *Id.* at *3.

E. Proportionality Bars Relatively Burden-Free Relevant Discovery That Would Not Likely Make a Difference

Haukereid v. Nat'l R.R. Passenger Corp., 816 F.3d 527, 534 (8th Cir. 2016), was a personal-injury case involving an elderly passenger who may or may not have had dementia falling to his death from an exit door of a moving train. The court affirmed the grant of summary judgment, holding that the lower court properly concluded there was not adequate evidence that any act or omission of defendant was the proximate cause of the passenger's death. The court used a "gross abuse of discretion" test:

> Haukereid claims that the district court violated Federal Rule of Evidence 26 by denying his motions which would have compelled Amtrak to produce 11 investigation reports about passengers who had allegedly exited trains through windows of exit doors and to produce a Rule 30(b)(6) witness to testify about "prior incidents involving passengers exiting moving trains operated by Amtrak." Haukereid contends that these reports and the testimony he sought are relevant to prove that Andrew did not fall out of a window. Under Fed.R.Civ.P. 26(b)(1), a party "may obtain discovery regarding nonprivileged matter that is relevant to [its] claim or defense and proportional to the needs of the case." Here, the district court did not grossly abuse its discretion by denying Haukereid's discovery requests because the record already contained evidence about the unlikelihood of a window exit. See Fed.R.Evid. 403. Moreover, Haukereid has not shown that if his discovery requests had been granted, the evidence would have affected the issue of proximate cause. …

(Citation omitted.) Judge Kelly dissented.

F. Proportionality Bars Discovery of Excessively Marginal Relevance

Flynn v. Square One Distribution, Inc., 2016 WL 2997673 (M.D. Fla. May 25, 2016) (No. 6:16-MC-25-ORL-37TBS), was a personal-injury case in which the issue was whether the warning on the water-sports product was adequate. Plaintiff sought discovery from a nonparty as

to the development of the warning label. The court held that the development of the label was bot particularly relevant, but noted the very broad standard of relevance under Rule 26. It then held that the proportionality requirement limited the effect of that broad definition of relevance:

> But to be discoverable, the requested information must also satisfy the proportionality requirement meaning it must be more than tangentially related to the issues that are actually at stake in the litigation. See Fed. R. Civ. P. 26(b)(1) (2015)[5]; In re: Blue Cross Blue Shield, File No, 2:13-CV-20000-RDP, 2015 WL 9694792, at * (N.D. Ala. Dec. 9, 2015). The Court finds that the process that lead to the creation of the warning label on the ski Flynn was using when he was injured is not proportionally related to the issues at stake in the litigation, one of which is whether the warning – in its final version – was sufficient. Therefore, the testimony Plaintiffs seek from Meddock is not proportional to the needs of Plaintiffs' lawsuit against Defendant.

Id. at *4.

G. Proportionality Analysis Requires a Threshold Showing by the Discovering Party

Edmondson v. Velvet Lifestyles, LLC, 2016 WL 5682591, at *6 (S.D. Fla. Oct. 3, 2016) (No. 15-24442-CIV), was a Lanham Act trademark case in which the plaintiff models sought the membership list of a swingers' club that had allegedly misappropriated their likenesses in its marketing. The Magistrate Judge deferred ruling until after the district court had decided a pending motion to dismiss, and in the interim required additional information from both sides. The court stated:

> Because relevance is evaluated as part of a proportionality analysis of the requested discovery, the merits of the claim are considered. … Therefore, the threshold questions are whether the requested lists would be important in assisting the Parties to determine the amount of damages available here for the alleged Lanham Act violation and whether the requests meet the other factors listed for the proportionality assessment. To demonstrate that the lists are within the permissible scope of discovery, Plaintiffs here must make a "threshold showing" and confront the reality that "[m]ere speculation that the information might be useful will not suffice" because litigants seeking to compel discovery must "describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case." … Pursuant to this framework, the Undersigned notes that Judge Lenard initially dismissed the sole Lanham Act sua sponte with language which places the post-Order Amended Complaint in doubt. In the dismissal Order, Judge Lenard unequivocally held that Plaintiffs "have not — and likely cannot — state a claim for false advertising under the Lanham Act." … Combined with the earlier language that Plaintiffs "likely cannot" state a claim, the language permitting an amended complaint implicitly cautioned Plaintiffs that they might not be able to state a Lanham Act claim. … That dismissal motion is not yet ripe, but it generates an additional

> factor for me to consider in the proportionality analysis: whether the requested discovery would be relevant if the sole claim is subject to significant challenge.

(Citations omitted.)

H. Presence of Proportionality as a Defense to a Discovery Sanction

Lester v. City of Lafayette, 639 F. App'x 538, 543 (10th Cir. 2016), an ADA and Rehabilitation Act wrongful-discharge case, reversed the award of attorneys' fees to defendant, running against plaintiff's counsel, for seeking discovery of "from the City seeking admissions and information from City supervisory personnel concerning their knowledge of the supervisor's arrest and whether he was disciplined." The court held that the discovery was clearly relevant and proportional to the needs of the disparate-treatment case, and therefore was not sanctionable:

> But as noted, one of the reasons included in Ms. Lester's termination letter was the written reprimand for her improper conduct during the police call-out to her home. Whether the supervisor received a reprimand for improper conduct regarding the police department during his DUI arrest therefore may have been relevant to the issue of disparate treatment. *See* Fed.R.Civ.P. 26(b)(1) (providing for discovery of any relevant nonprivileged matter that is proportional to the needs of the case); *see also Trujillo v. PacifiCorp*, 524 F.3d 1149, 1159 (10th Cir.2008) (noting that "disparate treatment of similarly situated employees contributes to a reasonable inference of pretext" which would defeat the employer's claimed legitimate reason for discharging the employee). Neither the magistrate judge nor the district court addressed Ms. Lester's disparate-treatment-relevancy argument either in denying her motion to compel or in awarding attorney fees to the City. More to the point, the inquiry as to the propriety of attorney-fee sanctions is not whether the evidence sought was relevant, but whether reasonable people could differ as to the appropriateness of Mr. Lamar's request for the evidence. Under these circumstances, we think reasonable people could differ. Therefore, because the attorney-fee award was based on a clearly erroneous assessment of the evidence, it was improper.

VI. Effects on Discovery of the Amendment to Rule 1

On December 1, 2015, Rule 1 was amended to impose on the parties—and implicitly on their counsel—the duty "to secure the just, speedy, and inexpensive determination of every action and proceeding."

Megdal Associates, LLC v. La-Z-Boy, Inc., 2016 WL 4503337 (S.D. Fla. Feb. 1, 2016) (No. 14-81476-CIV), relied on the amendment to Rule 1 to quash a defense interrogatory asking for the factual and legal basis for all allegations in the Complaint.

> The courts that have rejected these sorts of interrogatories have reasoned that "requir[ing] answers for them would likely cause delay and unreasonable expense of time energy, and perhaps money." *Hilt*, 170 F. R. D. at 187. The Court agrees with the

> reasoning and conclusion of *Hilt*, and notes that such broad interrogatories are not consistent with Rule 1 of the Federal Rules of Civil Procedure. For, "if the Rules' drafters intended to authorize interrogatories with an impact as wide as the entire case, they could more realistically and easily have adopted a simple rule to require every pleading to be accompanied by a statement of all facts supporting every allegation and the identification of every knowledgeable person and supporting document. They did not do so."

Id. at *6.

Similarly, *Blake v. Batmasian*, 2016 WL 4618931 (S.D. Fla. Sept. 2, 2016) (No. 15-CV-81222), discussed the interplay of the proportionality requirement and the amendment to Rule 1: "This Rule makes crystal clear the obligation of judges—and lawyers—to cooperate and control the expense of litigation. This Court takes the amendments to the Federal Rules of Civil Procedure seriously and demands that counsel also take them seriously." *Id.* at *3.

VII. Sanctions for Spoliation of Electronic Data

A. Proving Bad Faith

Houston v. C.G. Sec. Servs., Inc., 820 F.3d 855, 858–59 (7th Cir. 2016), found bad faith from a party's failure to respond to a third-party subpoena before it was added as a party, its four-month delay after being added as a party before it began its search for documents, its delay in providing information, its failure to inform plaintiff that the information it had was not definitive, its repeated changes to the information, and one of its' officials false or evasive t4estinony. The court stated:

> C.G. further argues that it did not conduct discovery in bad faith and that any mistake or inadvertence on its part was nothing more than "bad record-keeping" unworthy of sanction. To be sure, we have declined to impose sanctions where there is no showing of bad faith or improper purpose. … Nonetheless, upon review, there is sufficient evidence to support the district court's finding that C.G. acted in bad faith. For instance, before C.G. was joined as a defendant, Houston served on C.G. a non-party documents subpoena. C.G. never responded to this subpoena. Although Houston did not seek relief for C.G.'s failure to comply with the subpoena, service of the subpoena alerted C.G. to the need to search for and secure documents related to its work for Hyatt at the New Year's Eve party. Nevertheless, C.G.'s initial search as part of its discovery obligations did not take place until at least April 2013, roughly four months after C.G. was added as a party. Furthermore, C.G. did not provide information sought by Houston regarding the security personnel working for C.G. at the party in a timely manner, failed to alert Houston that it could not provide reasonably definitive information about the personnel, and then proceeded to continually change its answers about the personnel. There is also evidence of false or, at best, reckless and evasive testimony offered by at least one of C.G.'s witnesses, namely Charles Guynn, C.G.'s owner and president. Such

> conduct does not comport with C.G.'s claim that it did the best it could to provide Houston with accurate, timely information in discovery.

(Citation omitted.)

Brown Jordan Int'l, Inc. v. Carmicle, 2016 WL 815827 (S.D. Fla. March 2, 2016) (No. 0:14-CV-60629), *appeal pending*, stated at *35:

> If direct evidence of bad faith is unavailable, the moving party may establish bad faith through circumstantial evidence." … To establish bad faith through circumstantial evidence, the moving party must establish:(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. … "The party seeking the sanctions must establish all four of these factors where there is no direct evidence of bad faith." …

B. Sanctions Awarded Where Bad Faith Shown or Implied

1. Default

Roadrunner Transp. Servs., Inc. v. Tarwater, 642 F. App'x 759, 759-60 (9th Cir. 2016) (*per curiam*), was a misappropriation case brought by Roadrunner against its former employee, John Tarwater. The court affirmed the entry of default against Tarwater for spoliation of electronic information:

> The district court did not abuse its discretion by entering default judgment as a sanction for Tarwater's deletion of data from his laptop computers. … There was ample evidence that Tarwater deleted emails and files on his laptops after receiving multiple preservation demands from Roadrunner, and even after the court explicitly ordered Tarwater to preserve "all data" on his electronic devices. In addition to Tarwater's own admissions, a third-party computer expert concluded that files on one of Tarwater's devices had been deleted and overwritten during the litigation, and that the deletions likely "bypasse[d] the [computer's] Recycle Bin" through a user-initiated process. In light of the evidence of spoliation, and the nature of Roadrunner's claims, the district court did not clearly err in finding that Tarwater willfully destroyed the data, that Roadrunner had been deprived of its "primary evidence of Tarwater's alleged misappropriation and related misconduct," and that a less drastic sanction could not have adequately redressed the prejudice to Roadrunner. …

(Citations omitted.) The court stated that, even if amended Rule 37(e) were held applicable, the court would have reached the same decision. *Id.* at 760 n.1. Finally, the court affirmed the

award of $350,000 in attorneys' fees to Roadrunner, and the entry of compensatory damages to it.

2. Mandatory Adverse Inference

O'Berry v. Turner, 2016 WL 1700403 (M.D. Ga. April 27, 2016) (No. 7:15-CV-00064-HL), involved a car-truck collision in which plaintiff had repeatedly asked for the driver's log and PeopleNet truck information maintained by defendant for the truck in question. Defendants had no electronic document-preservation policy, and their practice was to have one employee print out a paper copy of information specified in a litigation-hold letter, put it in a manila envelope, and hold it until the information was requested. During the litigation, defendants moved the computer server containing the information and the manila envelope to another location, and many people with access to the information would not have known of its importance. The court held that under the 2015 amendment to Rule 37, a mandatory adverse inference was proper:

> Based on the facts presented, the Court concludes that ADM and Archer Daniels Midland Company acted with the intent to deprive Plaintiffs of using the driver's log and additional PeopleNet information in litigation. As a practical matter, it is simply irresponsible to print a single paper copy of information which one has a duty to preserve under Fed. R. Civ. P. 26. At the very least, Mr. Causey should have made additional efforts to ensure the preservation of these materials once the spoliation letter was received on August 18, 2013. However, ADM had no written policy on the proper procedure for preserving information that may be relevant in foreseeable litigation, at least not that Mr. Causey was aware. In addition to lacking a document preservation policy, ADM failed to ensure that these documents were maintained while in their sole possession. The documents were moved from one building to another, during which individuals unaware of their importance had access to and control over the information. Further, no one from ADM or the law firm representing Defendants contacted Mr. Causey about these documents or requested copies of these documents until January 2016, despite numerous requests for the documents by Plaintiffs' attorneys. All of these facts, when considered together, lead the Court to conclude that the loss of the at-issue ESI was beyond the result of mere negligence. Such irresponsible and shiftless behavior can only lead to one conclusion—that ADM and Archer Daniels Midland Company acted with the intent to deprive Plaintiff of the use of this information at trial.
>
> Accordingly, the Court believes severe measures, such as those discussed in subdivision (e)(2), are most appropriate to remedy the wrong that has occurred in this case. Specifically, the Court considers the adverse inference jury instruction, outlined in Rule 37(e)(2)(B), to be the proper sanction. The Court will instruct the jury that it *must* presume that the lost information, including the driver's log and all other data that was collected through PeopleNet, was unfavorable to ADM and Archer Daniels Midland

> Company. This presumption applies only to Defendants ADM and Archer Daniels Midland Company, and not to the other Defendants involved in this lawsuit.

Id. at *4 (emphasis in original).

3. Adverse Inferences in Bench Trial, But No Further Sanctions

Brown Jordan Int'l, Inc. v. Carmicle, 2016 WL 815827 (S.D. Fla. March 2, 2016) (No. 0:14-CV-60629), *appeal pending*, is a pair of consolidated cases. Carmicle was a high-level executive of Brown Jordan. Brown Jordan said it fired him for cause, and sued him for violations of the Computer Fraud and Abuse Act and the Stored Communications Act, breach of fiduciary duty and the duty of loyalty, conversion, unjust enrichment, and breach of contract. Carmicle sued it for breach of contract and fraudulent misrepresentation. When it was already clear that there was a dispute, Carmicle remotely locked his company-issued laptop, and then claimed that he forgot the PIN he had used and was actually trying to lock a laptop he claimed to have brought from the company, and which he had left with the company while ownership was being discussed. Carmicle also remotely wiped his company-issued iPad, which he had allegedly used to take pictures of other employees' e-mails. The court held that the amended Rue 37(e) should be used, and that it made no difference. It applied adverse inferences in deciding the bulk of the suit for Brown Jordan. The court denied Brown Jordan's request for stronger sanctions:

> The Court declines to impose the additional sanctions requested by the Brown Jordan Parties, including dismissal of Carmicle's claims, entry of default against him, and attorneys' fees. The Court's inherent powers are potent and "must be exercised with restraint and discretion." … Dismissal and default are the most severe sanctions available to the Court, and are therefore appropriate only when less drastic measures are insufficient. … That is not the case here, particularly in light of the Court's ultimate conclusion that Carmicle's employment was properly terminated for cause and that Carmicle is not entitled to any profits interests or severance pay. With respect to attorneys' fees, the Court notes that Magistrate Judge Brannon has awarded attorneys' fees and costs to the Brown Jordan Parties in connection with certain discovery violations by Carmicle and has ordered additional briefing on other issues, which remain outstanding. … While the fees requested in the Brown Jordan Parties' motion for spoliation sanctions are not exactly the same as those awarded by Magistrate Judge Brannon for discovery violations, the Court concludes that an award of additional attorneys' fees for Carmicle's spoliation of evidence is unnecessary. The Court's explicit finding of bad faith and consequent decision to draw adverse inferences against Carmicle are sufficient.

Id. at *37 (citations omitted).

C. <u>Sanctions Denied Where There Was a Failure of Proof</u>

Applebaum v. Target Corp., 831 F.3d 740 (6th Cir. 2016), was a products-liability case involving an alleged brake defect in a bike the plaintiff purchased, which she claimed caused her to fall and injure herself. A jury disagreed and handed down a defense verdict. Plaintiff appealed arguing that it was error to deny an adverse-inference instruction for spoliation of electronic data she thought would have been entered into defendant's computer systems. The court disagreed, and affirmed the defense verdict. The court explained:

> It bears adding that to the extent Applebaum sought an adverse inference instruction for spoliation of electronic information, a 2015 amendment to Civil Rule 37(e)(2) required her to show that Target had "intent" to deprive her of the information's use. A showing of negligence or even gross negligence will not do the trick. Fed. R. Civ. P. 37, 2015 Advisory Comm. Note. Applebaum would not have been able to show any degree of fault for Target's alleged destruction of records, because she cannot show that Target destroyed the records—if they even existed in the first place—after it was put on notice of litigation.

(F.3d page information not available.)

Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 695 (N.D. Ga. 2016), applied the amended Rule 37(e) to the ADEA plaintiff's request for sanctions for the defendant's reformatting and recycling of the computer she had used at work, instead of preserving it. However, the court held that the result would have been the same under pre-amendment Eleventh Circuit precedent. The court denied the sanction because plaintiff could not show there was any relevant information on the computer, or that the defendant would have been on notice of her claim in time to preserve whatever was there.